

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2004-000714-001 DT

12/19/2005

HONORABLE MARK R. SANTANA

CLERK OF THE COURT
K. Wendroff
Deputy

FILED: 12/21/2005

R T D HOLDINGS INC

MICHAEL T DENIOUS

v.

ARIZONA DEPARTMENT OF REAL ESTATE
(001)

DOUGLAS ERIC LAU

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RULING

I. JURISDICTION

This Court has jurisdiction pursuant to A.R.S. § 12-905.

II. FACTS/PROCEDURAL HISTORY

On January 28, 2004, the Arizona Department of Real Estate (the Department) issued a Summary Suspension Order against RTD Holding's Inc.'s (RTD) Unsubdivided Lands Public Report. RTD filed an appeal of that order with the Department and sought Department approval to correct deficiencies in the Public Report pursuant to A.R.S. § 32-2195.03(B)(6). The Department denied RTD's request to correct deficiencies and a hearing was scheduled before the Office of Administrative Hearings (OAH) for April 20, 2004.

A Notice of Hearing was issued by the Department on March 18, 2004, alleging that RTD created a subdivision and offered for sale and sold parcels without obtaining a subdivision public report, in violation of A.R. S. § 32-2181(A) and § 32-213 (F), RTD procured a public report by filing an application that was false and misleading, in violation of A.R.S. § 32-2183(C)(&) and that RTD issued an unsubdivided land report without meeting the requirements for such under the definition of unsubdivided lands and A.R. S. § 32-2195.

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On March 23, 2004, RTD filed a motion for summary vacation of summary suspension with OAH. RTD's motion requested an expedited preliminary hearing to determine whether the Summary Suspension Order should be summarily vacated. RTD proposed to make corrections to the public report which would clarify the alleged false and misleading statements. The Department filed a response on March 29, 2004 arguing that RTD had no right to cure deficiencies because Greer Ranch was a subdivision and sales had already occurred. The preliminary hearing was scheduled to begin April 19, 2004. On that date, the Administrative Law Judge (ALJ) limited the hearing to oral argument on the motion for summary vacation. He indicated that he was inclined to grant RTD's motion and encouraged both sides to settle the matter. Settlement efforts were made, without success. Ultimately, the settlement discussions failed.

On May 7, 2004, another hearing was held on the motion for summary vacation. On May 24, 2004, the ALJ issued an interim order recommending lifting the summary suspension order. The recommended order was rejected by the Department's Administrative Actions Director, acting on behalf of the Commissioner of the Department of Real Estate (the Commissioner).

Thereafter, the evidentiary hearing on the summary suspension order was held on June 2 and 3, 2004. On June 14, 2004, the ALJ issued his decision (ALJ Decision). The ALJ decision determined that RTD had created a subdivision. The ALJ also, found, however, that the Summary Suspension Order was invalid because the Order did not contain a finding of a threat to the public health, safety or welfare that imperatively requires emergency action. The ALJ also found that the RTD Application for a Public Report was not materially false and misleading, as alleged in the summary suspension order. The ALJ recommended that the Summary Suspension Order be vacated and that RTD be allowed to make its proposed correction to the public report.

The Commissioner's Final Order ("Final Order") was issued on July 14, 2004. The Commissioner rejected the ALJ's recommended order and instead ordered that the summary suspension order be vacated and that the Unsubdivided Land Public Report be revoked.

RTD filed a Superior Court Complaint On July 29, 2004 and the Department answered. Thereafter, RTD dismissed without prejudice all counts from the Complaint except for the appeal of the agency action.

Along with the filing of the Complaint, RTD filed an Application and Memorandum for Expedited Order Permitting Plaintiff to Cure Deficiencies in Public Report. This Court denied that request by minute entry, dated March 9, 2005 finding that RTD had created a subdivision.

RTD raises the following issues in its appeal: (1) The Summary Suspension Order was not signed by the Commissioner, violating A.R.S. § 32- 2157(B) and A.R.S. § 32-2195.03(B)(6); (2) There was no initial finding nor any evidence to support any finding of threat to the public health, safety or welfare required for a summary suspension order; (3) RTD's appeal was not

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expedited, violating due process; (4) the Commissioner impermissibly disregarded the ALJ's factual findings; (5) the Department failed to demonstrate that the public report or the application for public report was materially false under A.R. S. § 32-2195(B)(10); (6) the Department was estopped from reversing its approval of Greer Ranch as an unsubdivided lands development; (7) the Department failed to establish that RTD had the requisite intent for the alleged misrepresentations.¹

III. STANDARD OF REVIEW

When an administrative decision is appealed to the superior court pursuant to the Administrative Review Act, the superior court's review is limited to deciding whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion. Sundown Imports, Inc. v. Ariz. Dept. of Transportation, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (Ct. App. 1977). In determining whether an administrative agency's action is arbitrary or capricious and therefore an abuse of discretion, the record must show that there has been unreasoned action, without consideration and with disregard for the facts and circumstances. Petras v. Arizona State Liquor Bd., 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (Ct. App. 1981).

Additionally, the court may also review the evidence to determine whether the record contains substantial evidence that would support the decision. Klomp v. Ariz. Dept of Economic Security, 125 Ariz. 556, 557, 611 P.2d 560, 561 (Ct. App. 1980). The reviewing court does not conduct a trial de novo, act as trier of fact or substitute its view of the evidence for that of the agency. Siler v. Ariz. Dept. of Real Estate, 193 Ariz. 374, 378, 972 P.2d 1010, 1014 (1998).

The court cannot intervene if any evidence supports the administrative decision and should not reweigh the evidence in making that determination or substitute its own judgment where factual questions and agency expertise are involved. Blake v. City of Phoenix, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (Ct. App. 1988). If two inconsistent factual conclusions can be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion. Webster v. State Bd. of Regents, 123 Ariz. 363, 365, 599 P.2d 816, 818 (Ct. App. 1979).

Finally an agency head's decision is the final administrative decision and is entitled to deference. Smith v. Arizona Long Term Care System, 207 Ariz. 217, 220 84 P.3d 482, 485 (Ct. App. 2004). But this Court has the authority to make its own rulings on questions of law and is not bound by the agency head's determination. Bucciarelli v. Ariz. Dept. of Transportation, 166 Ariz. 67, 68, 800 P.2d 54, 55 (Ct. App. 1990)

¹ RTD also argues that it lacked the requisite intent to be a subdivider or that it intended to create a subdivision. But this Court has already ruled that RTD created a subdivision and issues relating to the intent to create that subdivision or to act as a subdivider are inherently part of that ruling. If these issues need further review, they should be reexamined on appeal.

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IV. ANALYSIS

- A. Did the signing of the Summary Suspension Order by Department's Administrative Actions Director, rather than the Commissioner, violate A.R.S. § 32- 2157(B) and A.R.S. § 32-2195.03(B)(6)?

RTD argues that the provisions of A.R.S. § 32-2157(B) and A.R.S. § 32-2195.03(6) preclude anyone but the Commissioner from issuing an administrative action order. Those statutes (and others) do specifically refer to the Commissioner as the person authorized to undertake certain administrative actions, including administrative enforcement. The question is whether the Commissioner may delegate that authority to other officials within the Department.

The Arizona Supreme Court recently addressed the question of when a state agency director may delegate authority to other agency employees in Facilitec v. Hibbs, 206 Ariz. 486, 80 P.3d 765 (2003). In Facilitec, The Arizona Department of Administration (ADOA) had solicited bids to provide office furniture to the State. The State awarded the contract to a contractor other than Facilitec. Id. at 486, 80 P.3d at 765. Facilitec filed a protest demanding that the contract be rescinded and a new one be awarded. The State Procurement Officer denied the protest. Facilitec appealed to the ADOA Director Elliot Hibbs (Hibbs). Hibbs delegated the matter to William Bell (Bell), the ADOA Deputy Director. Bell issued a preliminary decision and order, referring the matter to OAH for a hearing on certain issues. Id. at 766, 80 P.3d at 487. Following the hearing, the ALJ entered a decision recommending that Facilitec be awarded an additional non-exclusive contract to provide office furniture but not recommending that the original contract be rescinded. Bell rejected the ALJ recommendation, issuing an agency decision denying the protest. Id., 80 P.3d at 487.

On appeal, Facilitec argued that the Deputy Director lacked the authority to review the ALJ decision. Facilitec asserted that only the ADOA Director could make such a review and decision. The Superior Court reversed the ADOA Director determining that the Director did not have delegation authority. The Court of Appeals reversed the trial court, finding that the ADOA Director did have such authority.

Facilitec then petitioned the Arizona Supreme Court for review, which was granted. In deciding whether the ADOA Director could delegate to the Deputy Director, the Arizona Supreme Court stated that a court must look to the statutes defining the authority of an agency director or deputy director. In particular the court noted that A.R.S. § 38-462 provides that each deputy of a state or county officer possesses the powers and perform the duties prescribed by law for the office of the principal. Id. at 766, 80 P.3d at 488.

Our Supreme Court then reviewed the specific statute which described the authority of the ADOA Director to delegate his authority, AR.S. § 41-703.11. The Facilitec court also reviewed A.R.S. § 41-702(A), which describes the duties of the ADOA Deputy Director. The

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Arizona Supreme Court determined that neither of these specific statutes precluded the ADOA Director from delegating quasi judicial functions, such as deciding administrative appeals, from the Deputy Director. Id., 80 P.3d at 488. Rather, these statutes simply amplified the broad delegation power implied in A.R.S. § 38-462. Id. at 767, 80 P.3d at 489.

The Arizona Supreme Court also noted that there was not specific statutory prohibition on the ADOA Director delegating any of his duties, unlike the Director of the Department of Corrections. Id. at 767, 80 P.3d at 489. Given the lack of a specific prohibition, the Facilitec opinion concluded that the general language of A.R.S. § 38-462, by implication, gives a state agency director the ability to delegate any of his duties or responsibilities to a deputy. Id. at 767, 80 P.3d at 489

Facilitec is determinative in this case. A.R.S. § 32- 2109 gives the Commissioner the authority to appoint deputies and assistants to manage ADRE. Pursuant to A.R.S. § 38-462, the Commissioner had the authority to delegate his administrative enforcement duties to deputies. The hearing transcript indicates that the Department's Administrative Actions Director and Deputy Director had the delegated authority to issue summary suspension orders.²

This Court concludes that the Commissioner did not have to issue the summary suspension order. Pursuant to A.R.S. § 32- 2109 and A.R.S. § 38-462, the Commissioner could properly delegate that enforcement authority to the Administrative Actions Director, who issued the summary suspension order.

B. Is there evidence to support the summary suspension order's finding of a threat to the public health, safety or welfare?

A.R.S. § 32-2157(B) provides that the Department may issue a summary suspension order, but only if that order contains a specific finding that there is a direct threat to the public health, safety or welfare. The statutes states that the Commissioner must find that the public health, safety or welfare imperatively requires issuing the order and that Commissioner make such a factual finding. The Department and RTD agree that the suspension order did not contain such a finding.

Although the Commissioner's order does recite that there is an imperative threat to the public health, safety or welfare, the ruling does not contain a specific factual finding supporting this emergency conclusion. But if the administrative hearing provides evidence of a specific threat to the public health, safety or welfare, such testimony may justify the order. For example, in Silar v. Department of Real Estate, 193 Ariz. 374, 972 P.2d 1010 (1998), there was testimony that substandard roadways in illegally subdivided parcels posed a threat to the public health and safety. Id. at 378, 972 P.2d at 1014.

² RTD has not argued that the Administrative Actions Director did not have delegated authority to issue the administrative order. RTD's contention is that the Commissioner cannot delegate that authority.

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Because the factual finding is missing in the suspension order, the factual support for the summary suspension must be provided by hearing testimony and witnesses. The Department's Deputy Director of Investigations testified that the public report was necessary because RTD would not stop selling property voluntarily and RTD was engaged in the sale of an illegal subdivision. Moreover, there was a significant possibility that those who had purchased the parcels would split that property and in turn, sell these additional parcels; none of these owners/sellers would be subject to the summary suspension order. New purchasers would be purchasing property that did not have the benefit of the protective subdivision rule, to which they were entitled. Additionally, Department witnesses testified that the Application was inaccurate and misleading.

The court finds that there was sufficient evidence to support a finding of a threat to the public safety or welfare that imperatively required emergency action. Further sales by RTD (or others) would be in violation of the subdivision rules as Greer Ranch was a subdivision and RTD did not have a subdivision public report. The subdivision laws are intended to protect the public health, safety and welfare. Silar, supra, 193 Ariz. at 378, 972 P.2d 1014.

The threat of multiplying uncontrolled sales of illegal subdivision lots, when considered in conjunction with the allegedly misleading and inaccurate Application, created an imperative threat. The Department does not have to wait for an uncontrolled downward spiral of illegal subdivision sales before acting; it can nip the illegal activity at the bud with a summary suspension order.

Although the summary suspension order lacked the required emergency finding, the hearing evidence supports the Commissioner's decision.

C. Did Delay in RTD's Administrative Appeal Violate Due Process?

RTD argues that the Department violated RTD's substantive due process rights by delaying its administrative appeal. The record indicates that the administrative hearing was scheduled approximately 60 days from the issuance of the summary suspension order. Pursuant to the applicable statutes, that hearing date was set by OAH, not the Department. RTD did not file a motion to expedite the hearing date pursuant to A.R.S. § 41-1092.05(E). RTD did file a motion for summary vacation and requesting an expedited preliminary hearing. The ALJ heard oral argument on RTD's motion on April 19, 2004. As previously discussed, at the conclusion of the hearing, the ALJ encouraged the parties to try and settle the matter. The ALJ delayed issuing a decision on RTD's motion. Ultimately, settlement talks failed, and RTD reurged its motion for summary vacation to the ALJ. Following the ALJ's issuance of a recommended order and the Commissioner's rejection of that order, the administrative hearing was held on June 2 and 3, 2004.

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The pertinent facts indicate that any delay that occurred resulted from actions taken by OAH, the ALJ or with the mutual consent of the parties.

If RTD was truly concerned about the delay, it should have filed an early motion for expedited hearing pursuant to A.R.S. § 41-1092.05(E).

RTD does cite to Dahnad v. Buttrick, 201 Ariz. 394, 36 P.3d 742 (Ct. App. 2001), as requiring an expedited hearing upon the issuance of a pre-hearing suspension. But Dahnad involved a dentist license, the suspension of which would have deprived Dahnad of the right to work in his licensed profession. RTD was not deprived of the right to work; it was prohibited from making illegal subdivision sales at Greer Ranch; there is no “right” to engage in illegal activity.

The court finds that RTD’s substantive due process rights have not been violated.

D. Did the Commissioner Improperly Disregard the ALJ’s Factual Findings?

An agency head is not required to adopt the findings of fact and conclusions of law of the ALJ. Carondelet Health Services v. AHCCS, 187 Ariz. 467, 471, 930 P.2d 544, 548 (Ct. App. 1996). The agency head, however, must set forth a written justification setting for the reasons for the rejection or modification. A.R.S. § 41-1092.08 (B). The court finds that the Commissioner has set forth adequate written justification for rejecting the ALJ’s Findings of Fact and Conclusions of Law. In particular, there was substantial testimony at the hearing which would support the conclusion that immediate action was needed to prevent the illegal sale of unsubdivided land.

Moreover, although the ALJ reached a different legal conclusion concerning whether the Application was false and misleading, there was substantial testimony at the hearing that would support a factual determination that the Application contained inaccurate or misleading information, thus rendering the Application misleading. As discussed, if two inconsistent factual conclusions can be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion. Webster v. State Bd. of Regents, 123 Ariz. 363, 365, 599 P.2d 816, 818 (Ct. App. 1979).

E. Did the Department prove that RTD’s Application was materially false and misleading?

The administrative hearing provided evidence that RTD’s answers to the questionnaire, particularly the answers to 34(b)(I) concerning the special assessment district and to 17(a) concerning the domestic water supply were inaccurate and misleading. It is true that the ALJ did not conclude that the Application was false, but the agency does not act as an appellate court. The Commissioner is free to reach her own legal and factual conclusions concerning the evidence. If two inconsistent factual conclusions can be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion. Webster, *supra*, 123 Ariz at 365, 599 P.2d at 818. The administrative hearing record would support either

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ALJ or the Commissioner's position as to accuracy of RTD's answers concerning the special assessment district and the domestic water supply.

The court cannot intervene if any evidence supports the administrative decision; it should not reweigh the evidence in making that determination or substitute its own judgment where factual questions and agency expertise are involved. Blake v. City of Phoenix, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (Ct. App. 1988). There was substantial evidence presented at the hearing upon which the Commissioner could conclude that the Application was false and misleading. Whether these statements were materially false and misleading is a judgment best left to the agency's expert determination.

F. Is the Department estopped from reversing its position approving the unsubdivided lands development?

RTD argues that the Department is estopped from reversing its position approving the Greer Ranch as a unsubdivided lands development. In order to assert estoppel against the Department, RTD must show that the Department engaged in affirmative conduct inconsistent with a position that it later adopted and that RTD actually and reasonably relied on the Department's prior conduct. Western Corrections Group v. Tierney, 208 Ariz. 583, 589, 96 P.3d 1070, 1075 (Ct. App. 2003).

The hearing testimony established that the Department approved the land development following an administrative completeness review of the Application. An administrative completeness review is not a substantive approval; it merely establishes that the applicant has filed all the required materials. A.R.S. § 32-219.503(B)(4). The Department did not give a substantive approval to the Application and RTD was not entitled to rely upon it. Further, applying estoppel in this case would be contrary to express power of the Department to review unsubdivided lands report *before and after* the certificate of administrative completeness is issued, and the power of the Commissioner to commence an administrative action if appropriate. See A.R.S. § 32-219.503 (B)(6) (emphasis, the Court's).

Moreover, applying estoppel against the Department must not unduly damage the public interest. Western Corrections Group, *supra*. In this matter, the Department determined, as has this Court, that ADRE was engaged in the sale of an illegal subdivision. Because RTD was selling parcels in Greer Ranch without a subdivision public report, the Department has a duty to stop further sales by revoking the unsubdivided lands report. Applying estoppel against the Department would be contrary to the public interest as the goal of the subdivision laws is to protect the public. Siler, *supra*, 193 Ariz. at 378, 972 P.2d at 1014.

The Department is not estopped from revoking the unsubdivided lands report.

G. Did the Department establish that RTD acted with the requisite intent?

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RTD argues that the Department must prove that RTD acted with intent to defraud when it filed its Application containing the misleading answers in 34(b) (i) and 17(a). But there is nothing in the real estate statutes which requires proof of specific intent. No intent requirement is present in the definitions of subdivision or subdivider. See A.R.S. § 32-2181(A). Moreover, A.R.S. § 32-2183 (C)(7) indicates that filing a false or misleading application is grounds itself for revocation, regardless of whether the applicant attempted to obtain the public report by misrepresentation or deception. The Department must prove that RTD committed the act; it is not required to prove intent to defraud.

V. CONCLUSION

The Court concludes that the Commissioner's Final Order revoking RTD's Unsubdivided Lands Public Report is supported by substantial evidence. The Commissioner's Final order is not arbitrary or capricious, contrary to law or an abuse of discretion.

IT IS ORDERED:

The Commissioner's Final Order is affirmed.